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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 535

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN CATTO, JR. AND ROXANA CATTO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH COURT

REPLY BRIEF FOR JOHN CATTO, JR. AND ROXANA CATTO

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TREVINO PRINTING COMPANY — 2002 DURANGO STREET

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1. Petitioner in its Reply Brief argues that the facts in the instant case are indistinguishable from the **Ekberg** case and therefore a conflict exists between the decisions of the Fifth and Eighth Circuits. In support of its argument the Petitioner asserts that the taxpayers in the instant case "could have changed their method of accounting in 1948 and 1951, well after a 'meaningful option' was available." Such an assertion is clearly erroneous and unwarranted.

When the taxpayers began operating the ranches as a partnership with taxpayer, Roxana Catto's sister and her husband in 1938, they used the accrual (inven-

tory) method and valued inventory under the unit-livestocks-price method (R. 41.).[1] If the taxpayers had attempted to change from the accrual method to the cash method when the taxpayers continued operating the ranches as sole proprietorships they would have been required to secure the Commissioner's consent.[2]

There is no question, and the **Lewis** case clearly shows, that such a request by these taxpayers would have been neither considered nor approved by the Commissioner. Thus, the instant taxpayers made their election before it was known that gain upon the sale of breeding livestock could be treated as capital gain. Therefore, the facts in the instant case are indistinguishable from **Lewis**[3]. Accordingly, these taxpayers, like the taxpayer in the **Lewis** case, did not have a "meaningful option" when they began ranching operations in 1938; nor did they subsequently have such an option because of the Commissioner's arbitrary policy not to consider applications to change from the accrual to the cash basis.

2. Finally, respondent would like to note that the Petitioner has not demonstrated in its Petition or Reply Brief that a question of importance to the Federal tax law is presented. Respondents submit that the point here

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[1] This method was first adopted by taxpayer — Roxana Catto's father and mother in approximately 1920 and was continued by various partnerships which operated the ranches until 1938. (R. 41, fn. 2).

[2] See Letter of the Deputy Commissioner, January 5, 1945, 45-1 C.C.H. §391.459, where the Internal Revenue Service ruled that if income from a business operated by an individual was reported on the accrual basis and such business is suceeded by a partnership, permission of the Commissioner is required to change to the cash method.

[3] The Government conceded before the Court of Appeals that Lewis was indistinguishable if the Commissioner's consent would have been required to change from the accrual to the cash method. (Appellant's Reply Brief, p. 6.).

involved is extremely narrow and very limited in application and for this reason alone would not warrant review by this Court.

Respectfully submitted,

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October, 1965.